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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Lee Michael Beitman,

10 Plaintiff,

11 v.

12 Correct Clear Solutions, et al.,

13 Defendants.  
14

No. CV-17-03829-PHX-JAT

**ORDER**

15 Before the Court is Plaintiff's Motion for a Writ to Testify at Trial for Brian Finkel  
16 (the "Writ Motion") (Doc. 182) and Defendants' Motion in Limine No. 2 re Brian Finkel  
17 (the "Motion in Limine") (Doc. 228). Defendants responded to the Writ motion (Docs. 191,  
18 193) and Plaintiff replied (Doc. 197), and Plaintiff responded to the Motion in Limine (Doc.  
19 257). The motions have been fully briefed and the Court concludes that oral argument will  
20 not aid in its decision.<sup>1</sup> The Court now rules.

21 **I. Background**

22 Plaintiff is confined within the Arizona Department of Corrections (the "ADC"). In  
23 its April 1, 2020 Order Setting Final Pretrial Conference and Trial, the Court ordered  
24 Plaintiff to file a motion listing each inmate witness for whom he is seeking a writ to testify  
25 at trial, or writ of habeas corpus ad testificandum. (Doc. 169 at 2). For all witnesses, the  
26 Court ordered Plaintiff to state why each witness is necessary for trial and how Plaintiff  
27 intends to pay for the witness fees. (*See id.*). In response to the Court's April 1, 2020 Order,

28 <sup>1</sup> Plaintiff's request for oral argument is therefore denied. *See* Fed. R. Civ. P. 78(b);  
*Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

1 Plaintiff submitted the Writ Motion. (Doc. 182). Addressing the Writ Motion, Defendants  
2 submitted the Motion in Limine. (Doc. 228).

## 3 **II. ANALYSIS**

4 In the Writ Motion, Plaintiff seeks a writ of habeas corpus ad testificandum for  
5 inmate Brian Finkel (“Finkel”). (*See* Doc. 182 at 1). Plaintiff argues that Finkel is a  
6 necessary witness for trial because Plaintiff and Finkel have discussed Plaintiff’s alleged  
7 injuries, Finkel has a medical degree and experience, and, besides doctors who work for  
8 the ADC, “Finkel is the only other person with a medical degree that has had a chance to  
9 examine [Plaintiff’s] disfigured face.” (*Id.* at 1–3). Defendants object to Finkel’s testimony  
10 arguing that Plaintiff has not complied with Federal Rule of Civil Procedure (“FRCP”) 26  
11 regarding expert testimony, Finkel is not qualified to testify as an expert, and that Finkel’s  
12 proposed testimony is more prejudicial than it is probative. (*See* Doc. 191 at 2–3). Plaintiff  
13 responds that Finkel will not testify as an expert, but “as a reasonable person with common  
14 intelligence who just happens to be a [sic] unlicensed doctor with a medical background  
15 with extensive experience.” (Doc. 197 at 2).

16 In the Motion in Limine, Defendants request that “any testimony of Brian Finkel be  
17 precluded from the trial of this matter. (Doc. 228 at 1). Defendants’ motion is based on the  
18 same arguments asserted in their response to the Writ Motion. (*See* Doc. 228). Plaintiff  
19 argues that Finkel is not going to be testifying as an expert because the cause of Plaintiff’s  
20 injuries “is apparent to and easily understood by laypersons.” (Doc. 257 at 2).

21 “The determination whether to issue a writ of habeas corpus ad testificandum rests  
22 within the sound discretion of the district court.” *Cummings v. Adams*, No. CV F 03 5294  
23 DLB, 2006 WL 449095, at \*3 (E.D. Cal. Feb. 21, 2006) (quoting *Maurer v. Pitchess*, 530  
24 F.Supp. 77, 80 (C.D. Cal. 1981), *rv’d in part*, 755 F.2d 936 (9th Cir. 1985)); *see Jones v.*  
25 *Sandy*, No. 2:04-CV01933 ALA (P), 2008 WL 5068967, at \*1 (E.D. Cal. Nov. 26, 2008)  
26 (“A federal court has the discretion to issue a writ of habeas corpus ad testificandum.”).  
27 When making such a determination, a district court must weigh certain factors including:

28 [T]he costs and inconvenience of transporting the prisoner, potential danger

1 from the inmate's presence in court, the substantiality of the matter at issue,  
 2 the need for an early determination of the matter, the possibility of delaying  
 3 trial until the prisoner is released, the probability of success on the merits,  
 4 the integrity of the correctional system, and the interests of the inmate in  
 presenting his testimony in person rather than by deposition.

5 *Maurer*, 530 F.Supp. at 80. Ultimately, a court must weigh the importance of an inmate  
 6 witness's presence against the inconvenience and expense associated with the inmate  
 7 witness's testimony. *See Walker v. Sumner*, 14 F.3d 1415, 1422 (9th Cir. 1994).

8 After weighing the above factors, the Court finds that the benefit of Finkel's  
 9 testimony does not warrant granting a writ of habeas corpus ad testificandum. Plaintiff does  
 10 not argue that Finkel saw any of Plaintiff's alleged injuries take place, but only that Finkel  
 11 examined Plaintiff after his alleged injuries occurred. (*See* Doc. 182 at 1–2). Plaintiff,  
 12 additionally, fails to indicate when Finkel examined his face in relation to Plaintiff's  
 13 alleged injuries. (*See id.*). Thus, Plaintiff does not assert that Finkel has any firsthand  
 14 knowledge of Plaintiff's alleged injuries or treatment, but only that Finkel saw Plaintiff's  
 15 face at some point in time after his alleged injuries.

16 Further, as asserted by Defendants, Plaintiff has not complied with FRCP 26  
 17 regarding expert testimony, and the Court will not, nor has Plaintiff asked it to, waive  
 18 compliance with FRCP 26. Thus, Finkel cannot testify as an expert, regardless of his  
 19 qualifications. So, Finkel's testimony would be that of a lay person giving an opinion of  
 20 Plaintiff's injuries based upon no firsthand knowledge. Such testimony would be of little  
 21 to no probative value and is thus substantially outweighed by the costs of Finkel's  
 22 testimony and any prejudice that it may produce. *See Pinson v. Fed. Bureau of Prisons*,  
 23 No. CV-18-00535-TUC-RM, 2019 WL 10250755, at \*4 (D. Ariz. Dec. 17, 2019), *aff'd*  
 24 *sub nom. Pinson v. Estrada*, 812 F. App'x 701 (9th Cir. 2020) (denying writ of habeas  
 25 corpus ad testificandum because plaintiff failed to show that proposed witnesses possessed  
 26 probative firsthand knowledge regarding claims at issue).

#### 27 **IV. Conclusion**

28 Based on the foregoing, the Court will not issue a writ of habeas corpus ad

